IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 6, 2006 Session

FLOYD LAYMAN, CHRIS LAYMAN and JEFF LAYMAN v. FRANK T. HAYES and wife, CHRISTINE E. HAYES

Direct Appeal from the Chancery Court for Cocke County
No. 02-077-II Hon. Rex Henry Ogle, Chancellor

No. E2006-00752-COA-R3-CV - FILED DECEMBER 5, 2006

An action to have an easement established across defendants' property resulted in the Trial Court finding an express easement and also by prescription across defendants' property. We hold plaintiffs' established an easement by prescription.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

Brian T. Mansfield, Sevierville, Tennessee, for appellants.

William M. Leibrock, Newport, Tennessee, for appellees.

OPINION

Plaintiffs brought this action against defendants, asserting that the parties owned contiguous tracts of property, and that the plaintiffs and their predecessors had used a right of way across defendants' property for over 100 years to access their property, but defendants have refused them access to the right of way, and this action was brought to declare the rights of the parties regarding the existence of the right of way. Plaintiffs sought a declaration that the right of way existed, either expressly or by prescription.

Defendants, in their Answer, denied there was a right of way, and pled the affirmative

defenses of estoppel, waiver, statute of limitations and laches.

At trial, defendant Frank Hayes testified and admitted that his deed recited that it was subject to the right of others to use a right of way crossing the southeasterly portion of the property, and that when he purchased the property his title opinion referred to rights of way across the property. He testified that he did not talk to any neighboring landowners before buying the property, but he did inspect the property before buying it, and that he had a gravel road up to his barn, but it extended no farther. He testified that he observed nothing walking the property that led him to believe that there was a right of way that serviced the plaintiffs' property. Numerous witnesses, including the plaintiffs, testified to their knowledge of and use of ingress and egress across defendants' property to plaintiffs' property for many years.

At the close of proof, defendants moved to dismiss the action based on Tenn. Code Ann. §28-2-101, stating that the action was time-barred. The Court rejected this Motion, and ruled that there was "absolutely no question" that a right of way existed, because it was referred to in Hayes' title opinion, and it was shown on the map attached to that opinion. The Court found that plaintiffs had a right of way as shown in an exhibit, and that the overwhelming testimony was that there was an easement used by the plaintiffs to get to their property for many years. The Court further held that there was also evidence of an express easement contained in the deeds, and that "in reviewing the totality of the evidence, it is simply in my mind overwhelming that they have an easement."

The Court encouraged the parties to agree on the exact location of the easement and have it surveyed, and stated that if there could be no agreement, the Court would appoint a special master to determine a metes and bounds description. The Court found that the easement should "run the course of the 'old road' as depicted on the plat marked in evidence, as it currently lays on the ground." The court then certified the Judgment as final pursuant to Tenn. R. Civ. P. 54, and this Appeal ensued.

The issues presented on appeal are:

1. Was plaintiffs' action time-barred?

2. Did the Trial Court err in ruling that plaintiffs had established an easement?

3. Did the Trial Court err in finding that an "old road" depicted on a map demonstrated the easement, and in ordering a surveyor to serve as special master to establish the exact location of the easement?

4. Is this appeal frivolous?

We review the actions of the Trial Court as to its findings of facts with a presumption of correctness, unless the evidence preponderates otherwise, but we accord no presumption to any

issues of law ruled upon by the Trial Court. Tenn. R. App. P. 13(d).

Defendants claim this action is time-barred based on Tenn. Code Ann. §28-2-101, which they assert gave the plaintiffs only seven years after being denied access to the easement within which time to bring the action. Defendants argue that the proof established that Ms. Boyd, the defendants' grantor, fenced the property "at least by June 28, 1995" (two years after she purchased the same), and that plaintiffs' action was filed on October 10, 2002, i.e., four months too late. Without delving into the intricacies of the statute, it is important to point out that defendants have mischaracterized the nature of the proof on this matter. Both plaintiffs testified that they thought the property had been fenced in 1996. The property was undisputedly fenced before defendants bought it in June 1996.

Defendants rely on the testimony of Arthur Chris Layman to establish the date the fence was erected. Layman was asked:

> Q. So it would be fair to say that within two years after she [Boyd][1] got the property from Torrell and Velma Lunsford that she had put a fence around there and gated it? Would that be a fair statement?
>
> A. Yeah. Close to it, yeah.

The record does not contain any definitive proof of exactly when the fence was constructed. If it were fenced in 1996, as the Layman brothers claim, then the statute of limitations would not have run in 2002, and this is essentially the only proof on this matter, except the above quoted testimony. Boyd, who erected the fence, did not testify and there is nothing to indicate that she was unavailable. The burden was on the defendants to establish that the statute had run, and the evidence before the Court does not support that conclusion.

We affirm the Trial Court's conclusion that defendants failed to show that the action is time barred.

An easement is an interest in property "that confers on its holder a legally enforceable right to use another's property for a specific purpose." *Hall v. Pippin*, 984 S.W.2d 617 (Tenn. Ct. App. 1998). If an easement is claimed under a grant, the extent of the easement is determined by the language of the deed or granting instrument. *Foshee v. Brigman*, 129 S.W.2d 207 (Tenn. 1939). "The overriding purpose of any deed interpretation is the determination of the grantors' intent of the conveyance." *Collins v. Smithson*, 585 S.W.2d 598 (Tenn.1979). A party who purchases land with knowledge or notice of an easement in favor of other property ordinarily takes the estate subject to the easement. *Hargis v. Collier*, 578 S.W.2d 953 (Tenn. Ct. App. 1978).

Defendants' deed makes reference to two right of ways. First, it states that the

[1]Boyd purchased the property in June, 1993.

conveyance is "subject to the rights of others in and to the joint use of those portions of the above-described property which underlie the right-of-way crossing the Southeasterly portion of said property as shown on the aforementioned survey and as referred to in Deeds of record in WDB 152, Page 397", which is the 1975 deed from Velma Layman to Shults Layman. Second, defendant' deed also states that it is subject to the thirty foot right of way for ingress and egress to and from the Lunsford Cemetery, which is referred to in WDB 165, Page 390.

Based on the language quoted regarding the existence of a "Southeasterly" right of way, there is some evidence to suggest that there may be an express easement contained in the deeds which relates to the plaintiffs' property. The language contained in defendants' deed does not, however, create a right of way, but mentions one. The survey attached to defendants' title opinion shows an "old road" which does not terminate at the barn, as defendants claim, but continues on between the barn and the creek and leads to plaintiffs property, which the plaintiffs testified to, and the title opinion refers to the existence of a right of way. However, the prior deeds in plaintiffs' chain of title (at least the ones before us) do not contain any reference to a right of way, and it is unclear whether the creation of a right of way was the grantor's intent in including the language set forth in defendants' deed. Since the plaintiffs have not pointed to the grant of an easement in the deeds/documents that were introduced at trial, the evidence does not establish an express grant of an easement.

An easement may also arise by prescription, which requires that a person, "acting under an adverse claim of right, makes uninterrupted, open and visible use of another's property for at least twenty years with the owner's knowledge and acquiescence." *Ogilvie v. Ligon*, 2002 WL 31039335 (Tenn. Ct. App. Sept. 12, 2002), *citing Long v. Mayberry*, 36 S.W. 1040 (Tenn. 1896). The party claiming a prescriptive easement has the burden of proving by clear and convincing evidence the facts required to establish a prescriptive easement. *Id*. "Where a party is required to establish facts by clear and convincing evidence, on appeal, this court must review the evidence *de novo* to determine whether or not that party carried its burden; i.e., whether the evidence makes the factual conclusion 'highly probable' or leaves no substantial doubt about the correctness of the conclusion." *Id*.

Since there has been no expressed easement granted, the plaintiffs and their predecessors' use of the road crossing defendants' property is considered an adverse use. As we have previously explained, "to be adverse, the use must be under a claim of right inconsistent with or contrary to the interest of the owner and of such a character that it is difficult or impossible to account for it except on the presumption of a grant; or use under a claim of right known to the owner of a servient tenement; or use whenever desired without license, or permission asked, or objection made such as the owner of an easement would make of it, disregarding entirely the claims of the owner of the land." *Buck v. Avent*, 2004 WL 2218514 (Tenn. Ct. App. Oct. 1, 2004).

The evidence showed that their use of the easement was open and visible, and was consistent and uninterrupted for at least 50-60 years, until Boyd fenced the property. This evidence came from the plaintiffs and several third party witnesses, as well as defendants' predecessor-in-title.

The evidence establishes that the prior owners of defendants' property (the Lunsfords) knew of the use, and Ms. Lunsford testified that the Laymans used this road for years to access their property. She did not, however, testify that permission was ever given, and the fact that they did not object to the use does not render it permissive, as defendants assert. As we have previously explained, "if permission were simply 'knowledge and acquiescence' coupled with the failure to object, then 'the holder of the legal title could always defeat an adverse claimant by merely showing that he had never objected to the use of his property.' *Id., quoting Lamons v. Mathes*, 232 S.W.2d 558, 563 (Tenn. Ct. App. 1950). The Trial Court found, there was clear and convincing evidence of a prescriptive easement across defendants' property in favor of the plaintiffs, and we affirm the Trial Court's finding on this issue..

Plaintiffs argue that the Trial Court erred in asking the Special Master to develop a metes and bounds description for the "old road" as shown on the trial Exhibit. The Trial Court, however, gave the parties the option of agreeing on the location of the road and agreed-upon road surveyed for a metes and bounds description. There is no evidence in the record that the parties attempted to do this, or that the location of the "old road" as depicted on the Exhibit is impracticable. The Trial Court's decision to require to proscriptive easement to be agreed upon to be established by metes and bounds is appropriate, and we affirm the Trial Court on this issue.

Finally, plaintiffs assert that this is a frivolous appeal, pursuant to Tenn. Code Ann. §27-1-122. This Appeal is not so devoid of merit that it should be considered frivolous. Accordingly, this issue is without merit. *See, Wakefield v. Longmire*, 54 S.W.3d 300, 304 (Tenn. Ct. App.2001).

We affirm the Judgment of the Trial Court and assess the cost of the appeal to Frank and Christine Hayes.

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HERSCHEL PICKENS FRANKS, P.J.